IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2820 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

ANARULHAQ @ ANARU @ SALIM ABDUL HAMID ANSARI - Petitioner

Versus

COMMISSIONER OF POLICE and the Others -- Opponents

Appearance:

Mr. H.R.Prajapati for Mr. M.M. Trimizi for the petitioner

Mr.S.P. Dave AGP for Respondents Nos. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 25/11/97

ORAL JUDGEMENT

1. The petitioner, at present in custody under the order of detention dated 3rd December, 1996, passed by the Police Commissioner of the City of Ahmedabad, invoking the powers under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as `the Act'), by this application under Article 226 of the Constitution of India, challenges the legality and validity of the order. The facts which led the petitioner to prefer this application may in brief be stated.

2. The police received an information that the petitioner and his compeers were about to commit the offence of robbery in Saraspur area of Ahmedabad. The Police raided the place and arrested the petitioner. After the inquisition, the Police could know that against the petitioner one complaint was lodged with DCP, Ahmedabad City relating to the offences punishable under Section 120-A, 120-B, 400 of the Indian Penal Code, Section 25(1)(a) of the Arms Act and Section 135(1) of the Bombay Police Act, while another complaint that was lodged with the Odhav Police Station was with regards to the offences punishable under Section 392 read with Section 114 of the Indian Penal Code. The police also noticed that the petitioner had indulged in anti social activities. He was considered to be the dangerous person viz: a hector or a yahoo, or a fiery. He was by coercion extorting money, harassing the people and gloat. His aim was to deplume and deprecate. By terrorizing the people he caused many to bend him way, and those who were unwilling had to invite death warrant. Because of impending danger to his life, no one was ready to come forward and lodge complaint or give statement. Hence the chaotic & subversive activities of the petitioner were going berserk and were not possible to be curbed taking actions under general applicable penal laws. On the assurance that the particulars establishing their identity will not be uncovered, some showed willingness to state against the petitioner and their miseries and woes. The police could judge that to an alarming extent

the petitioner was striking terror in the society. The Commissioner of Police realised that anti - social activities of the petitioner were insurmountable and even if the actions were taken under the general laws, it would be nothing but futile exercise as applicable laws and penal provision were found skimpy. The Commissioner of Police then thought that the only way out to curb the activities of the petitioner was to pass the detention order and detain him in custody. He, therefore, passed the impugned order, pursuant to which the petitioner is at present under detention. He by this application challenges the legality of the detention orders.

3. Assailing the impugned order passed, the learned Advocate representing the petitioner made his submission based on different grounds. But, it is not necessary to deal with all those grounds as the application is likely to be disposed of on one ground going to the root of the case and it is about exercise of privilege not to disclose the particulars of the witnesses in the interest

of those witnesses available vide Section 9(2) of the Act. The authority has not furnished the particulars of the witnesses giving statement so as to keep their identity furtive and protect the witnesses from violent attack or other wrongs being done to them. The privilege when being in the public interest was exercised the petitioner had no just cause to assail the order.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention has been made are required to be communicated to the detenu and further an opportunity of making the representation against the order of detention is required to be given. The detenu is therefore required to be informed not merely factual inference and factual material which led to inference namely not to disclose the certain facts, but also the sources from which the factual material is gathered. The disclosure of sources would enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act the detaining authority is empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well founded for disclosing or not disclosing certain facts or particulars of those persons the authority making the order has to make necessary inquiry personally. What can be deduced from such Constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether disclosure of any facts involved therein is against public interest or both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the

question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If he mechanically endorses or accepts the recommendation of an outsider or inferior authority in that behalf the exercise of power would be vitiated as arbitrary. What is further required is the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bona fide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power the other side may challenge the privilege exercised on the ground that the same is vitiated by factual or legal mala fides. For my such view, a reference to a decision in the case of Bai Amina, W/o Ibrahim Abdul Rahim Alla v. State of Gujarat and Others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this court in the case of Chandrakant N. Patel v. State of Gujarat & Others 35(1) [1994 (1)] G.L.R. 761. may be made.

5. In view of such law made clear, the authority passing the detention order is under an obligation to furnish the material facts and particulars. But it is his duty to consider whether the disclosure of any facts involved therein is against public interest or against the interest of the witnesses giving the statement. When the privilege to withhold facts and particulars is exercised by the authority after being personally satisfied, it is then not open to the detenu to contend that in the absence of such facts and particulars, he is not in a position to make any effective representation. Reading the order in question, the copy of which is produced at page 11, it is abundantly clear that the authority passing the detention order got himself satisfied assigning the task of inquiry to his subordinates. He has not personally satisfied for the exercise of the privilege not to disclose certain particulars. It is submitted by the learned AGP Mr. Dave that the copy of the order produced at page 11 shows that the authority was fully satisfied before passing the order and that would indicate that the authority was also satisfied for the exercise of the power and withholding the particulars. The contention cannot be accepted. Reading the order at page 11, what can be deduced is that the authority was fully satisfied for passing the order of detention and not for exercising the privilege granted vide Section ((2) of the Act. About the same he has made

necessary mention in the order produced at Exhibit 11 which I have hereinabove referred to and that shows that there is no personal satisfaction. The contention therefore does not gain a ground to stand upon.

6. The detaining authority has not filed his affidavit justifying the exercise of privilege and satisfy the court about his personal satisfaction.

7. When the case about exercise of the privilege is not made out, it was incumbent upon the authority passing the order to supply all those particulars to the petitioner so that the petitioner could make effective representation but when all those particulars are not supplied without any just cause the petitioner's right to make effective representation was marred. When that is so, the order in question is not legal and valid and continuous detention is illegal. The detention order therefore is required to be quashed.

8. For the aforesaid reasons, the order of detention dated 3rd December, 1996 is hereby quashed and the petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule is accordingly made absolute.

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